Mohd Dalhar bin Redzwan & Anor v Datuk Bandar, Dewan Bandaraya Kuala Lumpur

COURT OF APPEAL (KUALA LUMPUR) — ORIGINATING MOTION NO W-07-21-94
SHAIK DAUD, GOPAL SRI RAM AND VC GEORGE JJCA
27 FEBRUARY 1995

Criminal Procedure *— Revision — Revisionary power of High Court — Judge called for and examined record of proceedings in magistrates' court — Whether amounts to 'proceedings' in High Court — Refusal to revise orders of magistrate — Whether amounts to revision — Whether defendant can apply to Court of Appeal for leave to refer questions of law — Criminal Procedure Code (FMS Cap 6) s 323(1) — Courts of Judicature Act 1964 s 66(1)*

Criminal Procedure *— Plea of guilty — Plea by company's general manager — Charge against company — Whether conviction illegal — Whether defendant can appeal against conviction or only against sentence — Whether defendant must appeal or can apply to High Court for revision — Courts of Judicature Act 1964 s 66(1)*

This was an application for leave to refer certain questions of law to the Court of Appeal, the main one being whether a party whose application for revision has been refused by the High Court, may apply to the Court of Appeal under s 66(1) of the Courts of Judicature Act 1964 ('the Act'). The first applicant, who was the general manager of the second applicant, Zaibar Auto (M) Sdn Bhd ('the company'), appeared before a magistrate on the company's behalf on a charge of contravening certain trade byelaws. He pleaded guilty to the charge. A conviction was recorded and the first applicant was fined RM500 which he paid, but he refused to pay the penalty of RM100 per day for as long as the offence continued. The second applicant could have appealed against the sentence imposed under s 305 of the Criminal Procedure Code (FMS Cap 6) ('the Code') but elected instead to instruct its solicitors to write to the High Court asking for the orders of the magistrate to be revised. Their complaint related, inter alia, to the plea of guilt by the first applicant whom, they contended, was not a director of the company. The argument was that even if the company was guilty of an offence, only its directors could be punished vicariously and not some inconsequential subordinate, such as the first applicant. The High Court judge called for the case record of the magistrates' court and, after examining it, refused to revise the orders made. The issue before the Court of Appeal was whether the refusal by the High Court to revise the orders came within the meaning of the words 'the exercise by the High Court of any power of revision' in s 66(5)(b) of the Act.

Held by a majority, that the court had no jurisdiction to entertain the application (VC George JCA dissenting):

(1) (Per **Gopal Sri Ram JCA**) The power to act in revision conferred by Ch XXXI of the Code must be read with the additional power reflected in s 35(1) of the Act. When read in its proper context, revision is the act of calling for the record of a subordinate court and the making of one or more orders in respect thereof. Where the High Court calls for the record under s 323(1) but having examined it decides to take the matter no further, there is no revision.

(2) (Per **Gopal Sri Ram JCA**) In order for the Court of Appeal to entertain an application under s 66 of the Act, the question concerned must have arisen before the High Court and its determination must have affected the event of the appeal or revision. The expression 'the exercise of any power of revision' in s 66(5)(b) of the Act encompasses not only the calling for the case record but also the making of an order. In this case, there were no proceedings before the High Court, the question posed did not arise in the High Court and there was no positive act of revision.

(3) (Per **Gopal Sri Ram JCA**) Under s 305 of the Code, a person who has been convicted on his plea of guilt is entitled to appeal only against the extent or legality of the sentence. However, once such the appeal has been lodged, he is not prevented from contending that the conviction was illegal and request the judge to act in revision. A court hearing an appeal against sentence is entitled to act in revision and set aside a conviction.

(4) (Per **Gopal Sri Ram JCA**) Save in exceptional cases and for very good reasons, a party cannot resort to the revisionary jurisdiction of the High Court when the decision complained of is appealable and no appeal has been lodged.

Cases referred to

Dorai Manickam v R [1936] MLJ 261 (folld)
Ho Kin Luan v PP [1959] MLJ 159 (refd)
Liaw Kwai Wah & Anor v PP [1987] 2 MLJ 69 (refd)
Low Hiong Boon v PP [1948–49] MLJ Supp 135 (refd)
Malayan Banking Bhd v International Tin Council and another appeal [1989] 3 MLJ 286 (folld)
Manokaran & Anor v PP [1979] 1 MLJ 262 (folld)
Nunis v PP [1982] 2 MLJ 114 (folld)
Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997; [1968] 1 All ER 694; [1968] 2 WLR 924 (distd)
Tan Yin Yen v PP [1973] 2 MLJ 143 (folld)
Tang Kee Chie v PP [1987] 1 MLJ 430 (folld)

(5) (Per **VC George JCA**, dissenting) The words 'on revision' in the heading of s 325 of the Code refer to the judge's exercise of his powers under s 323, ie calling and examining the record of proceedings of the inferior court, and directing his mind to whether or not he should exercise his powers under either s 324 or s 325.

(6) (Per **VC George JCA**) In this case, the judge had clearly exercised his powers under s 323 although he had declined on revision to exercise the powers under either s 324 or s 325. The exercise of his powers under s 323 was an exercise 'of revision', and was, by the terms of s 66(5)(b) of the Act, deemed to be an appeal from the decision of the subordinate court. Therefore, it may properly be the subject of an application for leave to take up the matter in the Court of Appeal provided that there is a question of law of public interest, the determination of which by the judge had effected his decision not to exercise his powers under s 324 or s 325. The phrase in s 326, 'when exercising his powers of revision' clearly refers to the judge deliberating on what order, if any, he should make after examining the record of the proceedings and is not limited to the orders under s 324 or s 325.

(7) (Per **VC George JCA**) If s 66(1) of the Act cannot be invoked in respect of s 323 of the Code unless the judge exercises his powers under s 324 and/or s 325, the party aggrieved by the judge's decision not to interfere with the magistrate's order may not take the matter further whereas the other party may do so if the judge had interfered. This would give rise to a lack of equality between the parties. There should be equality of consequences, particularly since s 66(1) read with s 66(5)(b) lends itself to be read with such equality of consequences and it should be so read.

(8) (Per **VC George JCA**) There were at least two questions of public interest before the judge, ie whether the first applicant's plea of guilt should have been accepted and whether he should have been convicted and fined or imprisoned for one month in default. There was no appeal from the magistrate's decision because a person who pleads guilty may not appeal against the conviction. The revisionary powers under s 323 were designed for the present kind of situation and is the more appropriate procedure to be used where a person who is not charged is subjected to a penalty.

(9) (Per **VC George JCA**) The first applicant was entitled to the leave sought. An order made in the criminal jurisdiction of the magistrates' court which is a nullity and unjust, should not be allowed to stand and the Court of Appeal should allow itself to give due consideration to the refusal of the judge to interfere. The conviction and sentence should be set aside and the fine be refunded with the direction that the magistrate fix a fresh return date for the summons when he could ensure the appearance of a person entitled to properly appear on the company's behalf.

Cases referred to

Bozson v Altrincham Urban District Council [1903] 1 KB 547 (refd)

Haron bin Mohd Zaid v Central Securities (Holdings) Bhd [1983] 1 AC 16; [1982] 2 MLJ 94 (refd)

Justin Milroy Narakera v PP [1990] 2 CLJ 226 (folld)

Ratnam v Cumarasamy & Anor [1962] MLJ 330 (refd)

Salaman v Warner [1891] 1 KB 734 (refd)

Salter Rex & Co v Ghosh [1971] 2 QB 597; [1971] 2 All ER 865; [1971] 3 WLR 31 (refd)

Obiter:

(Per **Gopal Sri Ram JCA**) Practitioners and deputy public prosecutors should note that where an application is made under s 66, the motion must be intituled in the matter of that section. The questions of law in respect of which leave is sought must appear in the body of the motion and not merely in the supporting affidavit.

[Bahasa Malaysia summary

Ini adalah suatu permohonan untuk kebenaran merujuk beberapa soalan undang-undang ke Mahkamah Rayuan, yang utamanya ialah sama ada sesuatu pihak yang telah memohon ke Mahkamah Tinggi untuk penyemakan tetapi permohonannya ditolak, boleh memohon untuk kebenaran di bawah s 66(1) Akta Mahkamah Kehakiman 1964 ('Akta itu'). Pemohon pertama, iaitu pengurus besar pemohon kedua, Zaibar Auto (M) Sdn Bhd) ('syarikat itu'), telah hadir di hadapan majistret bagi pihak syarikat itu atas tuduhan melanggar beberapa undang-undang kecil perdagangan. Beliau telah mengaku salah atas tuduhan itu. Sabitan telah dicatatkan dan pemohon pertama telah didenda RM500 yang beliau membayar tetapi beliau enggan membayar penalti sebanyak RM100 sehari selama kesalahan itu masih berterusan. Pemohon kedua boleh membuat rayuan terhadap hukuman itu di bawah s 305 Kanun Acara Jenayah (NMB Bab 6) ('Kanun itu') tetapi memilih untuk mengarahkan peguamcaranya untuk menulis surat kepada Mahkamah Tinggi untuk memohon supaya perintah majistret itu disemak. Aduan mereka itu berkenaan, antara lainnya, dengan akuan bersalah oleh pemohon pertama yang ditegaskan oleh mereka bukan seorang pengarah syarikat itu. Hujah mereka adalah bahawa meskipun syarikat itu bersalah atas sesuatu kesalahan, hanya pengarahnya boleh dihukum secara vikarius dan bukannya seorang yang berpangkat bawahan seperti pemohon pertama. Hakim Mahkamah Tinggi telah memanggil untuk rekod mahkamah majistret dan, selepas memeriksanya, enggan menyemak perintah yang telah dibuat. Isu di hadapan Mahkamah Rayuan ialah sama ada keengganan Mahkamah Tinggi untuk menyemak perintah itu jatuh di bawah maksud perkataan-perkataan 'penggunaan oleh Mahkamah Tinggi akan sesuatu kuasa menyemak' di dalam s 66(5)(b) Akta itu.

Diputuskan oleh majoriti, bahawa mahkamah tidak mempunyai bidang kuasa untuk mendengar permohonan itu (VC George HMR bertentangan):

(1) (Oleh **Gopal Sri Ram HMR**) Kuasa untuk bertindak secara penyemakan yang diberikan oleh Bab XXXI Kanun itu mesti dibaca dengan kuasa tambahan yang terdapat di dalam s 35(1) Akta itu. Apabila dibaca dalam konteks yang betul, penyemakan merupakan perbuatan memanggil untuk rekod sebuah mahkamah bawahan dan pembuatan satu atau lebih perintah berkenaan dengannya. Di mana Mahkamah Tinggi memanggil untuk rekod itu tetapi selepas memeriksanya, membuat keputusan supaya tidak bertindak seterusnya, itu tidak merupakan suatu penyemakan.

(2) (Oleh **Gopal Sri Ram HMR**) Supaya Mahkamah Rayuan dapat mendengar suatu permohonan di bawah s 66 Akta itu, soalan yang berkenaan mestilah telah timbul di hadapan Mahkamah Tinggi dan keputusannya mestilah mempunyai kesan atas rayuan atau penyemakan itu. Ungkapan 'penggunaan sesuatu kuasa menyemak' di dalam s 66(5)(b) Akta itu melingkungi bukan sahaja pemanggilan rekod kes itu tetapi juga pembuatan suatu perintah. Di dalam kes ini, tidak ada prosiding di hadapan Mahkamah Tinggi, soalan yang dikemukakan tidak timbul di Mahkamah Tinggi dan tidak ada suatu tindakan menyemak yang positif.

(3) (Oleh **Gopal Sri Ram HMR**) Di bawah s 305 Kanun itu, seseorang yang telah disabitkan atas akuan bersalah, hanya berhak untuk membuat rayuan terhadap berat atau sahnya hukuman itu. Akan tetapi, sebaik sahaja rayuan itu telah difailkan, beliau tidak dihalang daripada membuat penegasan bahawa sabitan itu menyalahi undang-undang dan meminta hakim untuk menyemaknya. Sebuah mahkamah yang mendengar satu rayuan terhadap hukuman berhak menyemak dan mengetepikan sabitan itu.

(4) (Oleh **Gopal Sri Ram HMR**) Kecuali di dalam kes luar biasa dan atas sebab yang sangat kukuh, sesuatu pihak tidak boleh menggunakan bidang kuasa penyemakan Mahkamah Tinggi apabila keputusan yang diadu itu boleh dirayu dan rayuan tidak difailkan.

(5) (Oleh **VC George HMR**, bertentangan) Perkataan-perkataan 'atas penyemakan' di dalam tajuk s 325 Kanun itu merujuk kepada penggunaan kuasa di bawah s 323 oleh hakim, iaitu memanggil dan memeriksa rekod mahkamah bawahan, dan menumpukan fikirannya pada sama ada beliau patut menggunakan kuasanya di bawah s 324 ataupun s 325.

(6) (Oleh **VC George HMR**) Di dalam kes ini, hakim dengan jelas telah menggunakan kuasanya di bawah s 323 walaupun beliau enggan menggunakan kuasanya di bawah s 324 ataupun s 325

apabila menjalankan penyemakan. Penggunaan kuasanya di bawah s 323 merupakan suatu tindakan 'penyemakan', dan adalah, mengikut terma s 66(5)(b) Akta itu, dianggap sebagai suatu rayuan daripada keputusan mahkamah bawahan. Oleh itu, ia boleh dengan betul dijadikan perkara suatu permohonan untuk kebenaran membawa perkara itu ke Mahkamah Rayuan dengan syarat bahawa terdapat soal undang-undang berkepentingan awam, yang telah diputuskan oleh hakim dan menghasilkan keputusannya supaya tidak menggunakan kuasanya di bawah s 324 ataupun s 325. Ungkapan di bawah s 326, 'apabila menggunakan kuasa penyemakan' jelas merujuk kepada pertimbangan hakim tentang apa perintah, jika ada, yang patut dibuat olehnya, selepas memeriksa rekod prosiding dan tidak terhad kepada perintah di bawah s 324 atau s 325.

(7) (Oleh **VC George HMR**) Jika s 66(1) tidak boleh dipakai berkaitan dengan s 323 Kanun itu kecuali jika hakim menggunakan kuasanya di bawah s 324 dan/atau s 325, pihak yang terkilan oleh keputusan hakim supaya tidak bercampur tangan dengan perintah majistret itu tidak boleh melanjutkan perkara itu lagi manakala pihak yang lain boleh berbuat demikian jika hakim telah bercampur tangan. Ini akan menimbulkan suatu ketidaksamaan di antara pihak-pihak tersebut. Seharusnya terdapat kesamaan akibat, terutamanya kerana s 66(1) Akta itu dibaca dengan s 66(5)(b) boleh dibaca supaya menghasilkan kesamaan akibat dan ia seharusnya dibaca sedemikian.

(8) (Oleh **VC George HMR**) Jelas terdapat sekurang-kurangnya dua soalan berkepentingan awam di hadapan hakim itu apabila beliau memilih supaya menggunakan s 323, iaitu sama ada akuan bersalah pemohon pertama seharusnya diterima dan sama ada beliau seharusnya disabit dan didenda atau dipenjarakan jika ingkar membayar denda. Penentuan setiap soalan oleh hakim mesti telah mengakibatkan keengganannya untuk bercampur tangan. Sebab mengapa tidak ada rayuan daripada keputusan majistret ialah kerana seseorang yang telah membuat akuan bersalah tidak boleh membuat rayuan terhadap sabitan itu. Kuasa penyemakan yang diperuntukkan oleh s 323 itu khas untuk keadaan sekarang dan merupakan prosedur yang lebih sesuai digunakan di mana seorang yang tidak dituduh dihukum dengan suatu penalti.

(9) (Oleh **VC George HMR**) Pemohon pertama berhak mendapatkan kebenaran yang dipohon. Mahkamah Rayuan seharusnya membenarkan dirinya mempertimbangkan keengganan hakim untuk bercampur tangan. Suatu perintah yang terbatal dan tidak adil yang dibuat di bidang kuasa jenayah mahkamah majistret tidak seharusnya dibiarkan. Sabitan dan hukuman itu seharusnya diketepikan dan denda itu dipulangkan kepada pemohon pertama dengan arahan selanjutnya bahawa majistret menetapkan tarikh kembalian baru untuk saman itu

bila beliau boleh memastikan bahawa seorang yang betul-betul berhak untuk hadir bagi pihak syarikat itu menghadirkan diri di hadapan mahkamah.

Obiter:

(Oleh **Gopal Sri Ram HMR**) Pengamal dan timbalan pendakwa raya patut mengambil perhatian bahawa di mana sesuatu permohonan dibuat di bawah s 66, tajuk usul itu mesti menyatakan bahawa ia adalah suatu perkara di bawah seksyen itu. Soalan undang-undang untuk mana kebenaran mahkamah dipohon mesti dinyatakan di dalam badan usul itu dan bukan hanya di dalam afidavit sokongan.]

Notes

For cases on the revisionary powers of the High Court, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2145–2150.

For cases on the plea of guilty, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1737–1826.

Complete list of cases referred to

Bozson v Altrincham Urban District Council [1903] 1 KB 547
Dorai Manickam v R [1936] MLJ 261
Haron bin Mohd Zaid v Central Securities (Holdings) Bhd [1983] 1 AC 16; [1982] 2 MLJ 94
Ho Kin Luan v PP [1959] MLJ 159
Justin Milroy Narakera v PP [1990] 2 CLJ 226
Liaw Kwai Wah & Anor v PP [1987] 2 MLJ 69
Low Hiong Boon v PP [1948–49] MLJ Supp 135
Malayan Banking Bhd v International Tin Council and another appeal [1989] 3 MLJ 286
Manokaran & Anor v PP [1979] 1 MLJ 262
Nunis v PP [1982] 2 MLJ 114
Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997; [1968] 1 All ER 694; [1968] 2 WLR 924
Ratnam v Cumarasamy & Anor [1962] MLJ 330
Salaman v Warner [1891] 1 KB 734
Salter Rex & Co v Ghosh [1971] 2 QB 597; [1971] 2 All ER 865; [1971] 3 WLR 31
Tan Yin Yen v PP [1973] 2 MLJ 143
Tang Kee Chie v PP [1987] 1 MLJ 430

Legislation referred to

Courts of Judicature Act 1964 s 66(1), (5)(b)
Criminal Procedure Code (FMS Cap 6) ss 283(1)(b)(4), 305, 307(1), 323–325, Ch XXXI
Employees Provident Fund Act 1951 s 164(4)
Local Government Act 1976
Licensing of Trades, Businesses and Industries (Federal Territory of Kuala Lumpur) Byelaws 1986 byelaw 2

Criminal Justice Act 1925 s 33 [Eng]
Supreme Court Act 1981 s 18(2)(a) [UK]

Appeal from: Summons No D–87–7221–94 (Magistrates' Court, Kuala Lumpur)

Su Tiang Joo (*Jayne Koe* with him) (*Cheah Teh & Su*) for the applicants.
Junaidah bte Abdul Rahman (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Shaik Daud JCA: I have had the privilege of reading in drafts both the judgments of my brothers, VC George and Gopal Sri Ram JJCA. In my view, there is a lacuna in the law on the refusal of a judge to exercise his revisionary powers but I feel the court is not the place to fill in this lacuna.

I therefore concur with the judgment of my brother, Gopal Sri Ram JCA.

Gopal Sri Ram JCA (delivering the majority judgment of the court): This court was moved on 6 February 1995, by the applicants for leave to refer certain questions to this court under s 66(1) of the Courts of Judicature Act 1964, which I will refer to as 'the Act' throughout this judgment. Having heard argument, we reserved judgment. I now hand down the conclusions I have arrived at and the reasons for them.

Although there is a reference in the motion to s 66(5)(b) of the Act, the first prayer asks for an order in the following terms:

> (a) Pemohon-pemohon diberi kebenaran untuk merayu kepada Mahkamah Rayuan Malaysia terhadap keputusan Yang Arif Dato' Syed Ahmad Idid bin Syed Abdullah Idid yang diberi pada 20 Oktober 1994 yang memutuskan bahawa berdasarkan kepada peruntukan di bawah s 323 Kanun Acara Jenayah, Yang Arif Hakim tidak perlu menggunakan kuasa penyemakan Yang Arif untuk menyemak kes ini.

Now that seemed quite odd because what was being sought was leave to appeal and not not leave to reserve questions. But Encik Su in the course of his address to us conceded that the motion was unhappily worded and that what he really wanted was, leave to reserve the questions set out in para 9 of the supporting affidavit.

For my part, I would readily express my gratitude to counsel and parties who do not not formulate their applications in cryptic language and await an oral hearing to explain what they really want. The consequence of drafting motions in unclear terms tends to mislead the court and does little or nothing to advance the course of justice which is the ultimate master we all serve. Practitioners and deputy public prosecutors should note that where an application is made under s 66, the motion must be intituled in the matter of that section. Further, the questions of law in respect of which

A leave is sought must appear in the body of the motion and not merely in the supporting affidavit as has been done in this case.

Having said this, I return to the present application. In para 9 of the supporting affidavit are identified several questions of law which, according to counsel, merit a reference. Of these, only one really has survived in B argument and that too in an amended form. It reads as follows: 'Whether a party who has applied for revision and has been refused it has a right to apply under s 66(1) of the Courts of Judicature Act 1966.'

To understand the question it is necessary to advert to the salient facts of the case.

C On 25 July 1994, the Datuk Bandar of Kuala Lumpur caused to be issued out of the magistrates' court a summons to the second applicant to attend before that court to answer a charge in the following terms:

> Bahawasanya kamu pada 19 Mei 1994 lebih kurang pukul 11 pagi didapati ada menggunakan premis No Lot 5.3 No 29, Jalan Pahang, Kuala Lumpur D sebagai tempat untuk menjalankan perniagaan menjual kereta terpakai tanpa lesen daripada Datuk Bandar Kuala Lumpur maka dengan itu kamu telah melanggar s 2 Undang-Undang Kecil Perlesenan Tred, Perniagaan dan Perindustrian (Wilayah Persekutuan Kuala Lumpur) 1986 adalah satu kesalahan boleh dihukum di bawah s 27 Undang-Undang Kecil tersebut.

On 28 September 1994, the first applicant, who is the general manager of E the second applicant, appeared before the magistrate on behalf of the latter. He pleaded guilty to the charge and was fined RM500 which he paid. He was also ordered to pay a penalty of RM100 per day for as long as the offence continued. That sum the applicants have refused to pay. The second applicant could have appealed against the sentence imposed F under s 305 of the Criminal Procedure Code (FMS Cap 6) ('the Code') within the time prescribed by s 307(1). But it elected not to do so. Instead, the applicants instructed solicitors to write to the High Court asking for the orders of the magistrate to be revised. This the solicitors did by a letter dated 15 October 1994. The principal complaints disclosed in their letter pertain to two matters, both of which were also mentioned to us in the G course of argument. The first relates to the validity of the byelaws for the breach of which the charge in question was preferred. The second relates to the plea of guilt by the first applicant whom, it is contended, is not a director of the second applicant. The argument here is that even if the second applicant was guilty of an offence, it is the directors of that applicant who may be punished vicariously and not some inconsequential H subordinate, such as the first applicant.

On 20 October 1994, the deputy registrar of the criminal division responded to the solicitors' letter. Shorn of its formalities, this is how it reads:

I > Dengan hormatnya saya merujuk kepada perkara di atas dan surat tuan bertarikh 14 Oktober 1994 yang kami terima pada 18 October 1994. Adalah saya diarahkan untuk memberitahu tuan bahawa pada masa hadapan surat tuan hendaklah dialamatkan kepada timbalan pendaftar dan bukan terus kepada YA Hakim.

> 2 Surat tuan telah dirujuk kepada YA Hakim dan YA telah mengkaji isu-isu yang telah ditimbulkan. Daripada apa yang ketara daripada rekod dan soalan yang dibangkitkan, jelas juga bahawa jawapannya ada di bawah rang undang-undang dan kes-kes autoriti. Berdasarkan kepada peruntukan di bawah s 323 Kanun Acara Jenayah, *YA telah memutuskan bahawa beliau tidak perlu menggunakan kuasa penyemakan beliau untuk menyemak kes ini.* (Emphasis added.)

From the contents of the letter, two matters are obvious. In the first place, the learned judge to whom the applicants' solicitors' letter was referred called for the record of the magistrates' court to satisfy himself as to the legality and correctness of the orders made. Secondly, it is clear that the learned judge was satisfied that the learned magistrate had acted correctly in making the impugned orders and for that reason declined to revise the orders in question.

The question that we have to deal with is whether in such circumstances this court has jurisdiction to entertain an application under s 66(1) of the Act. Encik Su argues in support of an affirmative answer. The learned deputy who appeared for the respondent had surprisingly indicated to Encik Su that she had no objections to the application. However, after hearing the exchange between counsel and members of the court she obviously realized the error into which she had fallen, and, therefore, decided to oppose the application. In my judgment, the issue raised by Encik Su must *ex necessitae rei* be answered by reference to the following principles which are well settled and beyond doubt.

I begin by recognizing that under s 305 of the Code, a person who has been convicted on his plea of guilt is entitled to appeal only against the extent or legality of the sentence. However, once such an appeal has been lodged, there is nothing to prevent an appellant from contending at the hearing that the conviction is illegal and requesting the judge hearing the case to act in revision. Of course the appellant in such a case ought, wherever possible, to give the court and the Public Prosecutor adequate notice of this, setting out the grounds on which the revision will be sought. A court hearing an appeal against sentence is entitled to and will, where appropriate, act in revision and set aside a conviction. *The Malayan Law Journal* is replete with pronouncements that support this proposition and I need only mention the decisions in *Low Hiong Boon v PP* [1948–49] MLJ Supp 135 and *Tang Kee Chie v PP* [1987] 1 MLJ 430 as illustrations of the principle. Reference may also be usefully had to the remarks of Thomson CJ in *Ho Kin Luan v PP* [1959] MLJ 159 at p 161.

In *Tang Kee Chie*, Chong Siew Fai J (now FCJ) stated the principle in the following words:

> Learned counsel for the prosecution, obviously with s 305 of the Criminal Procedure Code and/or s 50(2) of the Courts of Judicature Act 1964 in mind, submitted that since the appellant had pleaded guilty and was convicted on such plea, there could be no appeal against conviction. I need only refer to the following cases to illustrate that convictions were set aside where the accused persons were convicted on their own plea of guilty. *Heng Kim*

A *Khoon v PP* [1972] 1 MLJ 30, *Subramaniam & Anor v PP* [1976] 1 MLJ 76. If the facts disclosed in a case show the absence of an essential ingredient constituting the alleged offence such that no court would have convicted the accused, the conviction and sentence will be set aside. Even if there is no right of appeal, this court as *the appellate court is entitled to look into the record and exercise its power of revision* if the record shows that a failure of justice B had occasioned. (Emphasis added.)

In *Manokaran & Anor v PP* [1979] 1 MLJ 262, Abdoolcader J (as he then was) dealt with the revisionary power in the following way [at pp 262–263]:

C I have however not only extensive powers of revision in criminal proceedings under the provisions of s 325 of the Criminal Procedure Code but even wider powers conferred by s 35 of the Courts of Judicature Act 1964, and the deputy public prosecutor agrees that in a case like this where there is an appeal against conviction on a plea of guilty it is open to me to deal with the conviction in the exercise of my powers of revision if the circumstances of the case so warrant. *I would merely add that in my view notwithstanding the* D *provisions of s 305 of the Criminal Procedure Code an appeal against a conviction on a plea of guilty will still lie if the charge discloses no offence in law, in which event the conviction itself would be illegal and a nullity.*

It is true that the matters complained of in this appeal have been brought to my notice by way of a record of appeal and the proceedings before me are headed in the criminal appeal, but, as I pointed out to counsel E on both sides at the outset of this hearing, it is nevertheless open to me notwithstanding this to exercise my powers of revision in this matter, and I referred in this regard to the decision of the Privy Council in *In re Chunbidya & Ors* (1934) 62 IA 36 to the effect that *when the High Court has before it on appeal a record of criminal proceedings, it can proceed to exercise its powers of revision if it chooses to do so and make the requisite order* although precluded by F another provision in the Criminal Procedure Code from doing so in the appeal. (Emphasis added.)

The second principle of settled law is that, save in exceptional cases and for very good reasons, there can be no resort had by a party to the revisionary jurisdiction of the High Court when the decision complained G of is appealable and no appeal has been lodged: *Dorai Manickam v R* [1936] MLJ 261.

The third proposition which I think is self-evident is that, quite apart from all other considerations, in order for this court to entertain an application under s 66 of the Act, the question in respect of which leave is H sought must have arisen before the High Court and its determination must have affected the event of the appeal or revision. I say 'self evident' because of the language of that section which is cast as follows:

(1) When an appeal from a decision of a subordinate court in a criminal matter has been determined by the High Court, the Court of Appeal I may on the application of any party and shall on the application of the Public Prosecutor grant leave for the determination by itself of any question of law of public interest which has arisen in the course of the appeal and the determination of which by the High Court has affected the event of the appeal.

(2) An application for leave under this section shall be made within one month or such longer time as the Court of Appeal may permit of the determination of the appeal to which it relates and in the case of an application by the Public Prosecutor shall be made by or with the consent in writing of that officer only.

(3) When leave has been granted by the Court of Appeal under this section the High Court may make such orders as it may see fit for the arrest, custody or release on bail of any party to the appeal and the Registrar of the Court from which the appeal lies shall forward the record of the proceedings in the High Court to the Chief Registrar who shall thereupon appoint and notify to the parties to the appeal the time and place for the hearing of the matter.

(4) When leave has been granted by the Court of Appeal it shall hear and determine the question allowed to be referred for its determination and make such orders as the High Court might have made as it may consider just for the disposal of the appeal.

(5) For the purposes of this section but without prejudice to the generality of its provisions —

(a) any question of law regarding which there is a conflict of judicial authority shall be deemed to be a question of public interest; and

(b) the reservation of a question of law for the consideration of the High Court under any law relating to criminal procedure or the exercise by the High Court of any power of revision under any such law shall be deemed to be an appeal from a decision of a subordinate court in a criminal matter.

As can be seen from the inclusionary provision in s 66(5)(b), all references in sub-s (1) to an appeal are to be treated as encompassing orders made in, to quote the words of the statute, 'the exercise by the High Court of any power of revision'. That brings me to the heart of the matter before us. Does the refusal by a High Court to revise come within the phrase in the statute that I have quoted a moment ago?

Encik Su submits that once the judge of the High Court called for the record of the magistrate in the instant case, there was an exercise of the revisionary power and his refusal to intervene does not make it any the less. Cik Junaidah, responding, submits that there was no proceeding before the High Court, that the question now posed did not surface at all before that court and that in any event, the language of the subsection now under consideration requires the positive exercise of the power of revision so that the section does not bite when the High Court declines to act in revision and to make any order.

Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997; [1968] 1 All ER 694; [1968] 2 WLR 924 and *Liaw Kwai Wah & Anor v PP* [1987] 2 MLJ 69 were relied upon by Encik Su in support of his argument. *Padfield* is of no assistance since it concerned the grant of mandamus against the Minister who failed to act in accordance with an Act of Parliament and who gave no reasons for his refusal. *Liaw Kwai Wah* on the other hand is authority for two propositions. First, that there is a duty on the High Court to call for the record of a subordinate court once

A a request in that behalf has been made. Second, that the power to revise sentences imposed by an inferior court should be exercised sparingly.

It has been repeatedly emphasized by our courts that only questions falling within s 66(1) should be formulated for reference and that the section ought not to be used as an indirect method of appealing against an B otherwise non-appealable order or decision. Thus in *Tan Yin Yen v PP* [1973] 2 MLJ 143, Suffian Ag CJ, speaking on behalf of the Federal Court said:

> It is to be observed that questions of law which may be referred to us under s 66 should not be questions that are of personal interest only to the accused C or the Public Prosecutor, but should be questions that are of *public* interest, and it seems to us better if the High Court were to exercise their discretion under s 66 sparingly, so that the references are not used as an indirect way of appealing against matters that under the law have been finally determined by the High Court.

Again, in *Nunis v PP* [1982] 2 MLJ 114 at p 118, Raja Azlan Shah CJ D (Malaya), as he then was, said:

> For leave to be granted, it is necessary that the question posed is a question of law raised in the course of the appeal to the High Court and is of public interest. I have in delivering the judgment of this court in *A Ragunathan v Pendakwa Raya* [1982] 1 MLJ 139 dealt with the test for determining what E amounts to a question meeting the requisite factors for the purposes of s 66 of the Courts of Judicature Act, and I made it clear that if it is a mere question of principles, which in the matter before us only involve the construction of certain words in a statutory provision in their application to the facts of the case, the question would not be a question of law of public interest.
>
> F In the instant application we are of the view that the construction of the words in question in the statutory provision for which leave is sought under s 66 of the Courts of Judicature Act would be a matter of applying the relevant statutory provision to the factual circumstances of any particular case. The learned judge has in fact dealt with the facts of this particular case and applying the statutory provision thereto came to the conclusion that he G did. As I have said, these must of necessity vary from case to case according to the facts and we do not therefore think that the question raised before us is accordingly one of law of public interest.

Having given the matter careful consideration, I find that the answer to the problem posed lies in giving effect to the plain words of s 66(1) and (5) of H the Act. It is an established principle of statutory interpretation that in the absence of any ambiguity, and there is none in the instant case, a strict and literal construction should be applied to the language by which Parliament has expressed its collective intention: *Malayan Banking Bhd v International Tin Council and another appeal* [1989] 3 MLJ 286.

Applying the principles culled from the authorities to which I have I adverted, the conclusion I am driven to is that the expression 'the exercise of any power of revision' appearing in sub-s (5)(b) of s 66 of the Act encompasses not only the calling for the record of a case but also the making of an order. Were it the intention of the legislature to render a

different or wider meaning it would have said so by simply adding the phrase 'or a refusal to exercise' after the word 'exercise' appearing in sub-s (5)(b) of s 66. A

The power to act in revision conferred by Ch XXXI of the Code must be read with the additional and somewhat wider power reflected in s 35(1) of the Act. When read in its proper context, revision is the act of calling for the record of a subordinate court *and* the making of one or more orders in respect thereof. Where the High Court calls for the record but having examined it decides to take the matter no further, there is no revision. B

Put shortly, I agree with the submission of Cik Junaidah, the learned deputy, that there must be a positive act of revision, being more than the mere act of calling for the records. I also agree with her submission that there were no proceedings before the High Court and that in any event the question sought to be posed to us did not arise in the High Court. C

In the circumstances, the threshold requirements of s 66(1) are absent and this court has therefore no jurisdiction to entertain the application. D

Before I conclude, there is one other matter that I ought to have brought to the attention of counsel during argument. It has to do with the citation of the Datuk Bandar as the respondent to the motion. The proper respondent to *all* criminal proceedings before the High Court and this court is the Public Prosecutor and not the particular complainant in criminal proceedings commenced by the issue of a summons. This is for the reason that it is the Public Prosecutor who has the sole control over all criminal proceedings of whatever nature and by whomsoever commenced. E

For the reasons given in this judgment, this application fails and is hereby dismissed. F

VC George JCA (dissenting): Zaibar Auto Sdn Bhd ('the corporation') was served with a summons issued by the magistrates' court charging it with the offence of trading in contravention of byelaw 2 of the Licensing of Trades, Businesses and Industries (Federal Territory of Kuala Lumpur) Byelaws 1986, a byelaw of the Local Government Act 1976. G

Mohd Dalhar bin Redzwan, the general manager of the corporation, attended at the magistrates' court at Kuala Lumpur on 28 September 1994, the return date of the summons and, presumably on behalf of the corporation, pleaded guilty to the charge. A conviction was recorded and according to Mohd Dalhar, a fine was imposed *on him* of RM500, in default one month's jail and RM100 for each subsequent day the corporation continued to trade after 28 September 1994. H

Some time after 28 September 1994, Mohd Dalhar took legal advice, as a result of which and on his instructions, his solicitors on or about 14 October 1994, wrote to the relevant judge of the High Court at Kuala Lumpur charged with the supervisory role over the magistrates' courts in Kuala Lumpur, inviting him to exercise his revisionary powers under s 323 I

of the Criminal Procedure Code (FMS Cap 6) ('the CPC'). A number of grounds held out to give support for intervention by the judge were inclined in this letter.

The learned judge invoked s 323 and sent for and examined the record of proceedings of the magistrates' court presumably in the light of the matters raised in the letter to him. However, in effect, he arrived at the conclusion that there was nothing in the complaints made that merited interference by him with what had transpired at the magistrates' court. That that was the position and that he did so is clear from the letter dated 20 October 1994 written by his registrar to the solicitors in reply to their letter of 14 October 1994. Being dissatisfied with this, Mohd Dalhar has joined the corporation in this application invoking s 66(1) of the Courts of Judicature Act 1964 ['the Act'] (read with s 66(5)(b) thereof) seeking the granting of leave of the Court of Appeal for the determination by itself of what is said to be a question or questions of law of public interest.

Having heard submissions of learned counsel, we reserved judgment. I now hand down my views and the decision I would make on the application.

Section 66 of the Act is as follows:

(1) When an appeal from a decision of a subordinate court in a criminal matter has been determined by the High Court, the Court of Appeal may on the application of any party and shall on the application of the Public Prosecutor grant leave for the determination by itself of any question of law of public interest which has arisen in the course of the appeal and the determination of which by the High Court has affected the event of the appeal.

(2) An application for leave under this section shall be made within one month or such longer time as the Court of Appeal may permit of the determination of the appeal to which it relates and in the case of an application by the Public Prosecutor shall be made by or with the consent in writing of that officer only.

(3) When leave has been granted by the Court of Appeal under this section the High Court may make such orders as it may see fit for the arrest, custody or release on bail of any party to the appeal and the Registrar of the Court from which the appeal lies shall forward the record of the proceedings in the High Court to the Chief Registrar who shall thereupon appoint and notify to the parties to the appeal the time and place for the hearing of the matter.

(4) When leave has been granted by the Court of Appeal it shall hear and determine the question allowed to be referred for its determination and make such orders as the High Court might have made as it may consider just for the disposal of the appeal.

(5) For the purposes of this section but without prejudice to the generality of its provisions —

(a) any question of law regarding which there is a conflict of judicial authority shall be deemed to be a question of public interest; and

(b) the reservation of a question of law for the consideration of the High Court under any law relating to criminal procedure or the

exercise by the High Court of any power of revision under any such law shall be deemed to be an appeal from a decision of a subordinate court in a criminal matter.

It is obvious that for s 66(1) of the Act (read with s 66(5)(b) thereof) to be invoked vis-à-vis the exercise of power of revision of the High Court under s 323 of the CPC, there has to have been an exercise of some power of revision (the phrase used in the sub-sub-section is 'any power of revision') and there has to have been a question or questions of law of public interest that arose in the course of the exercise of such power of revision, the determination of which by the High Court had affected the exercise of the revisionary powers.

An important question that has arisen in this application is whether the calling for and examining of the record of the proceedings by the judge of the High Court and his giving due consideration to the matters raised by the solicitors per se, amount to an exercise by the judge of a power of revision within the meaning of the second limb to s 66(5)(b).

It is relevant and convenient to reproduce here the portions relevant to this judgment, of all the five sections of Ch XXXI of the CPC.

Of Revision

323 Power to call for records of inferior Courts

(1) A Judge may call for and examine the record of any proceeding before any Criminal Court of the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court.

...

324 Power to order further inquiry

(1) On examining any record under the last preceding section, or otherwise, a Judge may direct the Magistrate to make, and the Magistrate shall make, further inquiry into any complaint which has been dismissed under section 135, or into the case of any accused person who has been discharged.

...

325 Powers of Judge on revision

(1) A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by sections 311, 315, 316 and 317 of this Code.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard, either personally or by advocate, in his own defence.

(3) Nothing in this section shall be deemed to authorise a Judge to convert a finding of acquittal into one of conviction.

326 Permission for parties to appear

No party has any right to be heard, either personally or by advocate, before a Judge when exercising his powers of revision: provided that

A such Judge may, if he thinks fit, when exercising such powers hear any party, either personally or by advocate, and that nothing in this section shall be deemed to affect subsection (2) of the last preceding section.

327 Orders on revision

When a case is revised under this Chapter by a Judge he shall certify his B decision or order to the Court by which the finding, sentence or order revised was recorded or passed stating, where such finding, sentence or order has been varied, the grounds for such variation; and the Court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision do certified and, if necessary, the record shall be amended in accordance therewith.

C Section 323 is the first of the sections in Ch XXXI of the CPC which, as has been seen, is entitled 'Of Revision'. Section 323 provides powers to the judge of the High Court, the exercise of which powers is the calling for and examining the records of inferior courts for the purposes set out in that section. Sections 324 and 325 deal with the powers given to the judge to D be exercised after he has exercised the powers given to him by s 323. This is brought home in respect of s 324 by the provision that the power to order further inquiry is to be exercised 'after examining any record ...' and by the heading to s 325: 'Powers of Judge on revision.'

'On revision', in the context, in my judgment, has reference to the E exercise by the judge of the powers given to him by s 323 and having done so, that is, having called in and examined the record of proceedings of the inferior court, the directing of his mind as to whether he should or should not exercise the powers given to him by either s 324 or s 325.

In the instant case, it is clear that he had exercised that part of the F powers 'of revision' given by s 323 but he had declined 'on revision' to exercise the powers under either s 324 or s 325. As he had exercised his powers under s 323 which is an exercise 'of revision', such exercise is, by the terms of s 66(5)(b) of the Act (that refers to 'any power of revision'), deemed to be an appeal from the decision of the subordinate court in question and accordingly may properly be the subject of an application for G granting of leave to have the matter taken up in the Court of Appeal provided that there is a question of law of public interest which had arisen in the course of the exercise of the powers of the court under s 323, the determination of which by the judge had effected his decision not to exercise the powers allotted to him under ss 324 or 325.

H It has been suggested in the course of this application that s 66(1) may not be properly invoked in respect of the exercise of the powers given by s 323 of the CPC unless the judge concerned had gone on to exercise powers given to him by s 324 and/or s 325. The effect of this suggestion is that the party aggrieved by the judge not interfering with the magistrate's decision or order although invited to do so and even if there has been a I blatant miscarriage of justice, may not seek to take the matter further whereas the party on the other side may do so if the judge had interfered. This lack of equality between the parties in respect of the consequences arising from the decision taken by the judge is reminiscent of the problems

that arose in respect of the important procedural distinction between what is a final and what is an interlocutory judgment or order. There used to be differences in the procedures for appealing from a final judgment or order and one that was interlocutory only both in England and here. Order 14 applications illustrate the problem. If the application is in favour of the plaintiff applicant, it can be said that there is a final judgment. And it can be said that the defendant may normally appeal against such a judgment without leave. However if the O 14 is dismissed and consequently leave is given to the defendant to defend, it can be said that there has not been finality and that the order given is interlocutory in nature and that accordingly the plaintiff may not normally appeal without leave. Lord Esher MR in *Salaman v Warner* [1891] 1 KB 734, CA got round this obvious inequality in respect of consequences of the same application by looking at the nature of the application and not at the nature of the order made thereon. The basis of the *Salaman* test is that a judgment or order must be interlocutory in character unless it is made on an application which must operate in such a way that, whatever judgment or order is given or made on it, it must finally dispose of the dispute or controversy between the parties. In effect, even though an O 14 judgment is obviously a final judgment in that it has finally disposed of the dispute between the parties, it would be in the test applied by Lord Esher, deemed to be interlocutory. A fiction was resorted to in the interest of equality of steps to be taken post-judgment or order, by the aggrieved party.

In *Bozson v Altrincham Urban District Council* [1903] 1 KB 546 at p 548, Lord Alverstone CJ in effect refused to apply the said fiction. The test he applied was to look at the order made and not at the nature of the application. If the order finally disposes of the rights of the parties it is final, but if it does not, then it is interlocutory. In Malaysia, the former Court of Appeal had in *Ratnam v Cumarasamy & Anor* [1962] MLJ 330, applied the *Bozson* test. In 1971, Lord Denning MR in *Salter Rex & Co v Ghosh* [1971] 2 QB 597; [1971] 2 All ER 865; [1971] 3 WLR 31 pointed out that although the *Bozson* test may be logical, 'Lord Esher's test has always been applied in practise'. He preferred and applied the *Salaman* test. In the case from Malaysia, *Haron bin Mohd Zaid v Central Securities (Holdings) Bhd* [1983] 1 AC 16; [1982] 2 MLJ 94, the Privy Council though unhappy that the *Bozson* test had been applied had declined to interfere but only, it would seem, because the Federal Court had been applying the *Bozson* test and because it was a question of procedure and because there was a tradition in England of the House of Lords not interfering with the decisions of their Court of Appeal in respect of matters of procedure.

The *White Book 1985* in dealing with the distinction between interlocutory and final orders states at para 59/1/15:

> In deciding whether an order is final or interlocutory the Court of Appeal applies the test in *Salter Rex & Co v Ghosh* [1971] 2 QB 597; [1971] 1 All ER 865 CA (*Steinway & Sons v Broadhurst-Glegg* (*The Times*, 25 February 1983) CA; *White v Brunton* (12 March 1984) (unrep) CA). To determine whether an order is final or interlocutory regard must be had to the nature

A of the application made in court below ... (A different test was applied in *Bozson v Altrincham UDC* [1903] 1 KB 547 (which was followed by the Privy Council in *Haron bin Mohd Zaid v Central Securities (Holdings) Bhd* [1983] 1 AC 16; [1982] 2 All ER 481.) The Court of Appeal is now firmly committed to the Salter Rex test and does not apply the test adopted in *Bozson* and *Haron bin*; see *White v Brunton*, above.

B Eventually, in England, resort had to be made to statute to ensure that the inequality of the *Bozson* test was brought to an end. Section 18(2)(a) of the Supreme Court Act 1981 gave statutory approbation to the Esher fiction and provided that 'an order refusing unconditional leave to defend an action shall not be treated as an interlocutory order ...'.

C In my respectful judgment, in respect of the parties to the matter that has been looked into by a judge pursuant to his powers under s 323 of the CPC, there should be equality of consequences and particularly as s 66(1) of the Act (read with s 66(5)(b)) lends itself to be read with such equality of consequences, it should be so read.

D Another compelling submission that can be made in favour of holding that the invocation of the judge of s 323 amounts to the exercise by the High Court of a power of revision even though he chooses not to interfere with the magistrate's decision or order, is a reference to the terms of s 326 of the CPC which for convenience and emphasis is reproduced again:

E Permission for parties to appear

No party has any right to be heard, either personally or by advocate, before a Judge when exercising his powers of revision: provided that such Judge may, if he thinks fit, *when exercising such powers* hear any party, either personally or by advocate, and that nothing in this section shall be deemed to affect sub-section (2), of the last preceding section. [Emphasis added.]

F In my judgment, the phrase in the section 'when exercising his powers of revision' clearly has reference to the judge deliberating on what order (if any) he should make as he, pursuant to the powers given to him by s 323, examines the magistrate's record of the proceedings and is not limited to his making the orders he is permitted to make either pursuant to ss 324 or G 325.

What then has to be first considered by this court is whether there had been any question of law of public interest which arose for the consideration of the judge of the High Court in the exercise of the revisionary powers he had exercised pursuant to s 323, that is when he examined the H record of proceedings of the magistrates' court. And secondly, if there was such question, whether the determination of such question has affected the learned judge's decision not to interfere with the course taken by the learned magistrate.

In the affidavit in support of the application before us, reference was I made to three questions said to be such questions of law of public interest. They were as follows:

(i) That a party summoned has a right to appeal against the refusal of the High Court judge to revise the case based on the facts set out in exh A.

(ii) Whether s 10 of the Local Government Act 1976, or more specifically s 102(s), is with regard to a trade, business or industry which is of an obnoxious nature of which could be a source of nuisance to the public or a class of the public.

(iii) Whether selling used cars amounts to a trade, business of industry which is of an obnoxious nature of which could be a source of nuisance to the public or a class of the public.

Before us, questions (ii) and (iii) were not relied on and on it being pointed out that there is no nexus between the first question and s 66, counsel for the applicant said (and we entertained his saying so) that the words in the first of the question 'That a party summoned has a right to appeal' should be substituted so that the question would read as follows or to like effect (the substituted words are emphasized):

> *That a party who had applied to the High Court for revision has a right to apply to the Court of Appeal for leave to appeal* against the refusal of the High Court judge to revise the case based on the facts set out in exh A.

Exhibit A is the letter written to the learned judge by Mohd Dalhar's solicitors inviting him to exercise his revisionary powers. One of the matters raised in the said letter is that Mohd Dalhar had pleaded guilty to the charge against the corporation. The court had accepted the plea and as has been seen, imposed a fine of RM500 in default one month. The letter states at the paragraph marked 2(iv) that on his making the plea 'he' was convicted:

> Although Encik Mohd Dalhar bin Redzwan is the general manager of the accused Zaibar Motor (M) Sdn Bhd, he was and is not a director, company secretary, shareholder or officer of Zaibar Motor (M) Sdn Bhd and should not have been convicted.

In *Justin Milroy Narakera v PP* [1990] 2 CLJ 226, Mahadev Shankar J (as he then was) pointed out at p 229 that there is a lacuna in the CPC as to how a corporation is to plead to a criminal charge. He also pointed out that s 5 of the CPC allows the application of English law to fill the lacuna. Section 33 of the English Criminal Justice Act of 1925 provides for a company's representative to plead for the company. In the old Colony of Singapore CPC, s 56 (there was no equipolent section in the Straits Settlements CPC, the FMS CPC or the Indian CPC) provided for a representative to plead for the corporation — sub-s (4) of the said s 56 is as follows:

> A representative for the purposes of this section need not be appointed under the seal of the corporation, and a statement in writing purporting to be signed by the managing director of the corporation, or by any person (by whatever name called) having, or being one of the persons having, the management of the affairs of the corporation, to the effect that the person named in the statement has been appointed as the representative of the corporation for the purposes of this section shall be admissible without further proof as prima facie evidence that that person has been appointed.

In the *Justin Milroy Narakera* case, the corporation that Narakera represented in court (in his capacity as its managing director) had been charged with being in arrears of EPF contributions. Section 164(4) of the Employees Provident Fund Act 1951 provides that arrears ordered to be paid shall be recoverable in the same manner as a fine. Section 283(1)(b)(4) of the CPC allows the court to order imprisonment in default of payment of the fine imposed. Although it was the corporation that was charged in that case, as Mahadev Shankar J put it, the magistrates' court transposed Narakera into the shoes of the company as if he were its alter ego without his being charged for any offence and an order of imprisonment in default of the corporation paying up the arrears ordered to be paid was imposed on Narakera. Which is exactly what happened in the magistrates' court, in the instant case, to Mohd Dalhar. Mahadev Shankar J points out at p 231 that:

> This was done by resort to s 18(2) of the EPF Act which reads as follows in material particular:
>
> > 'Where an offence under this Act ... has been committed by a body corporate ... any person who at the time of the commission of the offence was a director ... of the body corporate ... shall as well as such body corporate ... be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence ...'
>
> It is the considered opinion of the court that before resort can be had to this section the director of the corporation in question has to be formally charged and the ingredients of the section proved against him. The two ingredients required to make out a prima facie case are that the company has committed the offence and secondly that the director was a director at the time the offence was committed.
>
> By transposing Mr Narakera into the shoes of the company, as if he were its alter ego, without any evidence whatsoever before him of the second ingredient the magistrate did something which was totally impermissible in law. Had he been formally charged it would have been open to Mr Narakera even if he had been a director at the time, to give evidence of due diligence. The learned magistrate pre-empted this right. Furthermore the liability to pay the arrears of contributions recoverable as a 'fine' was the liability of the company. It does not automatically pass on to its directors under s 18(2) of the Act. What fine a director must pay be assessed after he is convicted for the offence of which he is to be deemed guilty. That liability is to the fine per se. The liability to pay arrears of contributions which shall be recoverable as a fine is a liability of the employer alone under s 16A(4).
>
> Consequently it follows that the order made by the learned magistrate was a nullity and I hereby set it aside.

I gratefully and respectfully accept the ratio of that judgment of Mahadev Shankar J as set out hereabove as being a correct holding of what the law is. Applying that to the facts of the instant matter (and having in mind that the applicants have referred to the facts set out in letter 'A') it is my judgment that clearly there were at least two questions of public interest

which were before the judge when he chose to invoke s 323 and called for and examined the proceedings in the magistrates' court, that is to say: (i) whether Mohd Dalhar's plea of guilt should have been accepted; and (ii) should he have been convicted and in any event should he have been fined as he claims to have been. The order that there be one month's imprisonment in default of payment of the fine could not have been directed to the company and must have been directed to Mohd Dalhar and indeed suggests that it was Mohd Dalhar who was fined (and perhaps was even convicted!). In my judgment, there can be no doubt that the determination of each of those questions by the learned judge must have been in the affirmative and must have effected the event of the learned judge refusing to interfere with the learned magistrate accepting the plea of guilt and making the orders that he had made.

One obvious question that arises here is why was there no appeal from the decision of the magistrate. The short answer is that a person who pleads guilty may not appeal the conviction. He could have appealed against sentence and when the appeal came up perhaps taken up the issue of nullity but that, with respect, is a roundabout way of trying to rectify the error made. The revisionary powers provided by s 323 are, it seems to me, designed for just the kind of situation that Mohd Dalhar found himself to be in and is in my view the more appropriate procedure to be invoked where a person who is not charged is subjected to a penalty as appears to have happened in this case.

In my judgment, the applicant, Mohd Dalhar, is entitled to the leave he seeks. Speaking for myself, I would be inclined not to allow this matter to be prolonged any further. If we go by what Mohd Dalhar states in his affidavit (and the respondent has not taken issue with what he states), the conviction and the orders made subsequent thereto are clearly nullities. I pause to note that what transpired in this case both at the magistrates' court and after the matter was brought to the attention of the judge dramatically demonstrates that it cannot but be that the Court of Appeal should allow itself to give due consideration to the refusal of the judge to particularly interfere after he had called in and examined the records. An order made in the criminal jurisdiction of the magistrates' court which is a nullity and unjust, to boot, should not be allowed to stand. That being so, it seems to me that this court should forthwith set aside the conviction and the sentence passed whether it was against Mohd Dalhar or the corporation and direct that the fine be refunded to Mohd Dalhar with the further direction that the magistrate fix a fresh date for the return of the summons when he could ensure that some person entitled to properly appear on behalf of the corporation appears before the court.

I would end this judgment by referring to the suggestion made by Mahadev Shankar J in *Justin Milroy Narakera* in respect of the approach to be taken in respect of the lacuna in the CPC as to how a plea from a corporation charged with an offence be taken. I refer to the last sentence at pp 229–230 of his judgment:

A So nothing turns on this except to suggest that in future cases and until the law is amended, a plea from a corporation should be taken in writing by the company's representative and in the absence of the same, a plea of not guilty be entered and the trial proceeded therewith.

Having in mind the said s 56(4) of the Colony of Singapore CPC, I would B put the suggestion down as follows:

Until the law is amended, a plea from a corporation in respect of a charge against it should be taken from a representative of the corporation duly authorized by a statement in writing to do so signed by the managing director of the corporation or by the person having the management of the affairs of the corporation and in the absence of the same, a plea of not guilty C be entered and the trial proceeded with.

Order accordingly.

Reported by Anne Khoo

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